O'MELVENY & MYERS
555 13TH STREET, N.W.
WASHINGTON, D. C. 20004-1109
TELEPHONE (202) 383-5300
TELEX 896222 · FACSIMILE (202) 383-5414

400 SOUTH HOPE STREET
LOS ANGELES, CALIFORNIA 90071-2899
TELEPHONE (213) 669-6000
FACSIMILE (213) 669-6407

EMBARCADERO CENTER WEST
275 BATTERY STREET
SAN FRANCISCO, CALIFORNIA 94111-3305
TELEPHONE (415) 984-8700
FACSIMILE (415) 984-8701

1999 AVENUE OF THE STARS
LOS ANGELES, CALIFORNIA 90067-6035
TELEPHONE (310) 553-6700
FACSIMILE (310) 246-6779

610 NEWPORT CENTER DRIVE
NEWPORT BEACH, CALIFORNIA 92660-6429
TELEPHONE (714) 760-9600
FACSIMILE (714) 669-6994

CITICORP CENTER
153 EAST 53RD STREET
NEW YORK, NEW YORK 10022-4611
TELEPHONE (212) 326-2000
FACSIMILE (212) 326-2061

10 FINSBURY SQUARE
LONDON EC2A ILA
TELEPHONE (0171) 256-8451
FACSIMILE (0171) 638-8205

SANBANCHO KB-6 BUILDING
6 SANBANCHO, CHIYODA-KU
TOKYO 102
TELEPHONE (03) 3239-2800
FACSIMILE (03) 3239-2432

1104 LIPPO TOWER
LIPPO CENTRE
89 QUEENSWAY, CENTRAL
HONG KONG
TELEPHONE (852) 2523-8266
FACSIMILE (852) 2522-1760

WRITER'S DIRECT DIAL NUMBER
(202) 383-5300

May
31st
1 9 9 6

RECEIVED

MAY 31 1996

OUR FILE NUMBER
294,500-002

DC1-250784.V1

VIA SAME-DAY HAND DELIVERY

DOCKET FILE COPY ORIGINAL

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, D.C. 20554

Re: Comments in Reply of The Game Show Network, L.P., in MM Docket No. 92-266, CS Docket No. 96-60

Dear Mr. Caton:

On behalf of The Game Show Network, L.P. ("GSN"), and in accord with 47 C.F.R. § 1.419, enclosed for filing with the Commission are an original and eleven copies, which include copies for each Commissioner, of the Comments in Reply of GSN in connection with the Commission's Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking in the above referenced dockets.

An additional copy of the Comments is enclosed to be date-stamped. Please return the date-stamped copy to the courier for delivery to the undersigned.

Any questions regarding this filing should be referred to the undersigned. We very much appreciate your assistance in processing this filing.

Respectfully submitted,

John E. Welch

John E. Welch

Jeffrey J. Carlisle

Counsel to The Game Show Network, L.P.

Enclosures

cc: Lynn Crakes, Attorney,
Policy and Rules Division, Cable Services Bureau
Ed Gallick, Senior Economist,
Policy and Rules Division, Cable Services Bureau
Julia Buchanan, Attorney,
Policy and Rules Division, Cable Services Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	))))	MM Docket No. 92-266
	)	
Leased Commercial Access	)	CS Docket No. 96-60

COMMENTS IN REPLY OF THE GAME SHOW NETWORK, L.P.

John H. Beisner
John E. Welch
Jeffrey J. Carlisle

O'MELVENY & MYERS
555 13th Street, N.W.
Washington, D.C. 20004-1109

Counsel for The Game Show Network, L.P.

Dated: May 31, 1996

TABLE OF CONTENTS

COMMENTS IN REPLY OF THE GAME SHOW NETWORK, L.P.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)	MM Docket No. 92-266
	)	
Leased Commercial Access	)	CS Docket No. 96-60

To: The Commission

SUMMARY OF COMMENTS IN REPLY OF THE GAME SHOW NETWORK, L.P.

A significant number of comments in the above-captioned proceeding painted a distorted picture of the Congressionally mandated leased access regime and the leased access programmers that are likely to exercise their statutory rights to gain access to cable subscribers. The Game Show Network, L.P. ("GSN") makes the following specific comments in reply.

First, many comments are wrong in asserting that there is no demand for leased access in a diverse market. While there are a vast number of programmers

unaffiliated with cable operators, these programmers are not carried on many cable systems, have no bargaining leverage and do not use leased access because rates for leased access are unreasonably high. Reasonable rates for leased access will inevitably result in increased use and hence a greater diversity of voices.

Second, the Commission's proposed opportunity cost calculation must exclude purportedly "lost" subscriber revenue. Such subscriber losses are entirely speculative and could not be charged to leased access programmers fairly. Moreover, arguments for including such losses are not persuasive as they wrongly assume leased access programming is unappealing to subscribers and exaggerate the effect of leased access on channel line-ups and subscriber retention.

Finally, leased access at a reasonable rate is not a privilege. It is a statutory right. The Commission should reject demands for rules that would eviscerate this right, such as requiring a transition period or allowing unfavorable tier placement, and should view comments that programmers may use alternative distribution technologies or rely on increased capacity as irrelevant complaints that should be directed to Congress rather than the Commission. Programmers have the right to carriage at reasonable rates on cable systems today.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)	MM Docket No. 92-266
	)	
Leased Commercial Access	)	CS Docket No. 96-60

To: The Commission

COMMENTS IN REPLY OF THE GAME SHOW NETWORK, L.P.

The Game Show Network, L.P. ("GSN"), by its counsel, submits these comments in reply to comments submitted to the Commission pursuant to the Commission's Further Notice of Proposed Rulemaking[1] (the "FNPRM") in the above-captioned proceeding.

GSN hopes sincerely that any order issued in this proceeding is based on a correct understanding of the effect of the Commission's proposed rules. The Commission's proposed rules promise that local and national producers of high quality programming will have a genuine outlet despite the fact that they are not affiliated with cable operators. The

---

[1] Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, CS Docket No. 96-60 (March 29, 1996). GSN filed comments with the Commission on May 15, 1996 ("GSN Comments"). Hereinafter, all citations to comments in this proceeding omit reference to the docket number.

proposed rules will thus achieve the intent of leased access: to increase the diversity of voices in the video programming marketplace.

Accordingly, GSN makes the following points in reply to many of the comments filed in this proceeding. First, the tremendous demand for leased access has not yet materialized because rates are unreasonable. Second, lost subscriber revenue cannot be included in the cost calculation as there is no way to fairly calculate such lost revenue and arguments for including such lost revenue are fundamentally flawed. Third, leased access is a right, and should be treated as such.

By engaging in this proceeding and supporting the Commission's proposed rules, GSN is not asking for a handout, nor does it want to see cable operators suffer financial hardship or subscriber loss. GSN wants only to receive what it has been promised under the leased access statute: a meaningful opportunity for access to designated channels at reasonable rates. Thus, GSN implores the Commission to adopt its leased access rules as proposed in the FNPRM, with such modifications as GSN has suggested to refine or clarify the provisions of such rules.

I. LEASED ACCESS CAN ONLY SERVE AS AN OUTLET FOR DIVERSE PROGRAMMING IF RATES FOR LEASED ACCESS ARE REASONABLE

The aim of leased access is to "assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with the growth and development of cable systems."[2] Many comments in this proceeding note that there are hundreds of unaffiliated cable programmers and argue that this array of programmers shows that the Congressional intent to increase diversity in the video marketplace has been met, thus obviating the need for new leased access rules.[3] Thus, they imply that there is no demand for leased access.

These arguments misconstrue what Congress meant when it sought to promote diversity. The Congressional intent behind leased access was to create a diversity of program sources, not simply a diversity of program types irrespective of ownership. The legislative history of the 1984 leased access provisions plainly states that the "overriding goal

---

[2] Communications Act of 1934, as amended (the "Communications Act"), § 612(a), 47 U.S.C. § 532(a) (Supp. V 1993).

[3] See Joint Comments of Cable Television Operators and Request for Reconsideration 4, 6, 13 (filed May 15, 1996) ("CTO Comments"); Comments of Continental Cablevision, Inc. 33-35 (filed May 15, 1996) ("Continental Comments"); Comments of Outdoor Life Network et al. 12 & Exhibit 1 (filed May 16, 1996) ("Outdoor Life Network Comments"); Comments of Tele-Communications, Inc. and Request for Further Reconsideration 7 (filed May 15, 1996) ("TCI Comments"); Comments of Time Warner Cable 23-27 (filed May 15, 1996) ("Time Warner Comments"); Joint Comments of Turner Broadcasting System, Inc. et al. 6 (filed May 15, 1996) ("TBS Comments"); Comments of Viacom Inc. 8 (filed May 15, 1996) ("Viacom Comments").

. . . is divorcing cable operator editorial control over a limited number of channels."[4] This goal reflects the way Congress, the Commission and the media industry in general understand diversity. It has long been established in the literature of broadcast economics that monopoly behavior will produce more diversity of program types than competitive behavior because a monopolist wants to maximize the audience of the system as a whole rather than that of a particular channel.[5] While this is the benign side of a cable operator's monopoly, this does not address the perspective on diversity reflected by the leased access rules. Viewers value options within given program types[6] and society as a whole values a diversity of voices. If it were not for the latter, Congress and the Commission would allow greater ownership concentration in the broadcasting and cable industries. However, the reverse is true: the concept that diversity of voices is vital to the public informs the Commission's cross-ownership and multiple ownership rules.[7] Similarly, it also informs the

---

[4] H.R. Rep. No. 934, 98th Cong., 2d Sess. 50 (1984); see also FNPRM at ¶ 2 ("The 1984 Cable Act established commercial leased access to assure access to channel capacity of cable systems by parties unaffiliated with the cable operator who want to distribute cable programming free of the editorial control of the cable operator.")

[5] See Roger G. Noll et al., Economic Aspects of Television Regulation 49-53 (Studies in the Regulation of Economic Activity, The Brookings Institution, 1973); see also Bruce M. Owen and Stephen S. Wildman, Video Economics 64-100 (1992) (discussing traditional models of program choice).

[6] See Edward Greenberg and Harold J. Barnett, "TV Program Diversity - New Evidence and Old Theories" Am. Econ. Rev., May 1971, at 89-93.

[7] See, e.g., 47 C.F.R. § 73.3555 (1995) (multiple ownership rules for radio and television broadcast stations); 47 C.F.R. § 76.501 (cross-ownership rules for cable systems and television broadcast stations).

leased access rules.[8] Thus, while GSN acknowledges that cable operators present programming packages that represent a diversity of program types, the point of leased access is to provide a diversity of viewpoints that the cable operator *does not* choose.

Measured by this standard, leased access has more of a role to play than ever in assuring the diversity intended by Congress. Cable capacity is a scarce resource. What channel capacity is available is usually taken up by affiliated programming. As GSN has shown the Commission, cable operators hold significant equity positions in more than 75 percent of the 45 major cable programming networks with significant subscriber reach.[9] Outside of this group, the vast majority of unaffiliated cable programmers find it extremely difficult to gain access to cable systems, and find it all the more difficult to gain such access when cable operators barter precious channel capacity in exchange for retransmission consent of broadcasters. Consequently, insisting on carriage via leased access may be the only way unaffiliated cable programmers can reach an audience. Far from mitigating the need for leased access, the large number of unaffiliated video programmers searching for an audience intensifies the need for it.

---

[8] In this respect, the comparison of broadcast policy to cable policy is increasingly relevant because the combined viewership of basic cable programming services and pay cable services now exceeds that of the four major broadcast network affiliates combined in cable households, according to a Cable Television Advertising Bureau ("CAB") analysis of total day shares in all cable households for the 1994-1995 broadcast season. See Cable TV Facts 15 (CAB, 1995).

[9] See GSN Comments at 4-5, Exhibit A.

Thus, as the Commission has already indicated,[10] operators have not experienced an historical demand for leased access because the rates allowed under the highest implicit fee formula are unreasonable. At unreasonable rates and under unreasonable terms, it is hardly surprising that very few programmers have opted for leased access.

II. LOST SUBSCRIBER REVENUE MUST NOT BE INCLUDED IN THE COST CALCULATION

The cost formula will only result in reasonable rates, however, if it does not include costs that merely serve to artificially inflate rates. Many comments have requested that the Commission do this by arguing against the tentative conclusion to exclude the cost of lost subscriber revenue from the cost calculation.[11] The Commission arrived at this tentative conclusion because it believes "any such subscriber loss is too speculative to be measured accurately."[12] GSN agrees. Lost subscriber revenue cannot be included because it is too speculative and is, in any case, based on a distorted view of leased access programming that assumes from the start that such programming will cause a loss.

---

[10] See FNPRM at ¶ 6 ("[I]f the maximum rate for leased access is reasonable, the corresponding amount of leased access demand will also be reasonable.").

[11] See Comments of Adelphia Communications Corporation et al. 13-14 (filed May 15, 1996) ("Adelphia Comments"); Continental Comments at 11-12; Comments of Cox Communications, Inc. 13-18 (filed May 15, 1996) ("Cox Comments"); CTO Comments at 7-11; Comments of The National Cable Television Association, Inc. 12-15 (filed May 15, 1996) ("NCTA Comments"); TCI Comments at 19; Time Warner Comments at 11-18.

[12] FNPRM at ¶ 86.

A. Lost Subscriber Revenue is Speculative

Comments arguing in favor of charging leased access programmers for purportedly lost subscriber revenue frequently reference economic analyses showing that such revenue is absolutely essential to preserving the financial viability of cable operators.[13] Notably, however, none of these analyses show how lost subscriber revenue could actually be ascribed to leased access. More to the point, they do not show how such prospective loss could possibly be measured in a fair way. They do not because they cannot -- calculating prospective losses is inherently speculative. Cable operators must calculate subscriber loss *before such loss has even occurred* in order to arrive at a leased access rate. By what reasonable measure is this lost revenue to be calculated? GSN doubts cable operators would also be willing to calculate the number of subscribers that might be gained through increased use of leased access programming. Because it is impossible to fairly calculate subscriber loss prospectively, the Commission should view such proposed calculations as nothing more than an attempt to artificially boost leased access rates.

Nor could cable operators calculate subscriber losses retrospectively with any measure of reliability. A loss of subscribers over a period of time might be caused by leased access, but more likely than not it will simply be coincidental to leased access. Given the

---

[13] See Continental Comments at 9-12; NCTA Comments at 13; TBS Comments at 8; TCI Comments at 12-14; Time Warner Comments at 16. These arguments are rebutted, infra, at Section II.B.

growth of alternative video distribution technologies so often mentioned in the comments before the Commission, such a loss may be due to competition, demographics, rate increases, an economic downturn or any one of a host of other factors. In fact, addition of a leased access channel might even mitigate losses that might have otherwise been more severe. In effect, cable operators would blame leased access for all subscriber losses and recover their costs accordingly. Thus, cable operators are asking the Commission to require leased access programmers to insure the financial success of cable operators. Although Congress clearly did not intend that cable operators subsidize programmers, it also did not intend that programmers subsidize operators.

B. Leased Access Will Not Result in Subscriber Loss, and May Result in Subscriber Gains

Even if lost (or gained) subscriber revenue could be calculated with any degree of accuracy or fairness, there has been no persuasive argument before the Commission that such loss will occur. Every argument in favor of including lost subscriber revenue makes the same two flawed assumptions: first, that demand for leased access capacity will never exceed capacity such that market-based rates will take over and, second, that leased access programming is, by definition, undesirable and its increased use invariably will result in subscriber losses. The Commission should ignore these attempts to mischaracterize the leased access programming market.

With regard to demand for capacity, a reasonable rate will result in an appropriate level of demand for leased access.[14] Given the large number of unaffiliated programmers seeking access, GSN believes there will be a high demand for leased access capacity, particularly in major media markets where leased access programmers can reach a large number of subscribers with relatively few leased access agreements. Many cable operators have suggested that leased access rates under the cost formula will approach zero or even be negative, often without discussing the method whereby they arrived at such results.[15] If this is the case, GSN believes this presents both leased access programmers *and* cable operators with a significant opportunity. Since many unaffiliated new programmers cannot capture license fees from system operators in the current environment until they become established, minimal leased access rates guarantee that leased access will be attractive to a wide range of programmers and that demand will easily outstrip supply. Minimal leased access rates would thus result in an immediate shift to market-based rates and, therefore, significantly higher returns than might otherwise be available under the cost formula.[16]

---

[14] See supra Section I.

[15] See Cox Comments at 16; Comments of The Small Cable Business Association 6-7 (filed May 15, 1996) ("SCBA Comments"); TCI Comments at 14-15; see also TBS Comments at 8; Viacom Comments at 3.

[16] For example, consider the impact on two systems cited by Tele-Communications, Inc. ("TCI"): Washington, D.C. and Denver, CO. See TCI Comments, Attachment E. Each system had an average opportunity cost of negative $0.08, and would set aside six channels (presuming one-third would be reserved for minority and educational programmers). See id., Attachment E at 1. In the unlikely event that the marketplace establishes an average leased access rate of only $0.01 per subscriber per month for every channel, TCI would receive $0.09 (continued...)

At any rate, cable operators are incorrect in stating that the cost calculation will result in rates that are unfairly low. As proposed by the Commission, the cost calculation will include opportunity costs that may be sufficiently quantifiable, but nevertheless may not actually be suffered by the cable operator. For example, given that cable operators may have excess local advertising capacity, "lost" advertising may simply be shifted to free capacity on non-leased access channels. Furthermore, in contrast to some programmers, who have suggested that cable operators should designate only their lowest opportunity cost channels,[17] GSN has suggested that cable operators designate channels from among the group constituting the lowest third in terms of opportunity cost,[18] thereby according cable operators a reasonable amount of flexibility.

With regard to mischaracterization, GSN does not have to stretch its reading of comments in this proceeding to show that the Commission has been presented with a distorted picture of leased access programmers. Adelphia Communications Corporation et al. ("Adelphia") stated that "[i]f programming is so unattractive that a programmer has to pay to

---

[16](...continued)
per channel, or $0.54 per subscriber per month beyond its opportunity cost. GSN must assume that this amount would represent a significant cash flow increase to each system which could help finance further expansion of capacity.

[17] See Comments of Asiavision, Inc. 1 (filed May 14, 1996); Comments of Center for Media Education et al. 10-11 (filed May 17, 1996); Comments of The Community Broadcasters Association 3 (filed May 15, 1996).

[18] See GSN Comments at 8.

get on a system, it is unlikely that the programming will ever find audience acceptance."[19] TCI stated that leased access programming "must be assumed to have little or no appeal to cable customers."[20] GSN takes exception to such comments. As cable operators themselves have pointed out, there are a vast number of unaffiliated programmers, and they are seeking access on systems which, as cable operators have also pointed out, have very little capacity left.[21] Moreover, cable operators are unlikely to pay for cable programming that has not had a significant market test, confronting programmers with a "chicken-and-egg" problem: carriage is not possible without significant market approval, but such approval is not possible without carriage. In such an environment, it is inevitable that producers of high quality programming would pay for access as an intermediate step to seeking more traditional forms of cable carriage, if reasonable rates were available. In fact, high quality leased access programming may actually result in increased subscribership.

---

[19] Adelphia Comments at 4.

[20] TCI Comments at 21; see also Continental Comments at 35 ("programming that cable operators do not want to carry is almost by definition programming of little or no interest to subscribers"); CTO Comments at 6 ("much of leased access programming is unattractive to viewers"); Time Warner Comments at 30 ("[leased access] produces programming that consumers do not value and often find offensive").

[21] See NCTA Comments at 25-26 ("Cable systems serving more than two-thirds of the nation's subscribers have no excess channel capacity."); Time Warner Comments at 34 ("well over 90% of Time Warner's cable systems have no unused channel capacity").

Nevertheless, cable operators stated that leased access capacity is likely to be taken over by home shopping channels and infomercials,[22] as well as sexually explicit programming.[23] These assertions were supported by repeatedly cited analyses stating that only leased access programmers that receive significant revenue from direct sales can pay the rates required for leased access.[24] This is circular logic of the worst sort. These analyses assume a high cost of carriage, assert that no one could possibly afford such rates and then conclude that leased access is uneconomic for any but the most "undesirable" programmers. GSN acknowledges that direct sales programming enjoys an advantage under current leased access rates, which are so exorbitant as to be unaffordable for most advertising-supported programmers. However, the Commission's proposed rules would institute reasonable leased access rates affordable by all types of leased access programming.[25]

---

[22] See Continental Comments at 2-3; CTO Comments at 8, 13-14; TCI Comments at 9-11, 16; Time Warner Comments at 30-31.

[23] See Time Warner Comments at 31-32 (describing leased access carriage of sexually oriented programming on one cable system). Time Warner's reference to a single indecent channel as representative of the dangers of leased access is particularly objectionable given that Section 612(h) of the Communications Act has always allowed a cable operator to reject obscene or indecent leased access programming, and that Section 612(c)(2), as amended by the Telecommunications Act of 1996, increases a cable operator's discretion by allowing a cable operator to "refuse to transmit any leased access program . . . which contains obscenity, indecency or nudity."

[24] See, e.g., TCI Comments, Attachment A at 17 ("Certain types of programmers, especially home-shopping services and suppliers of infomercials, enjoy an advantage in the competition for leased access channels because none of their revenues are the result of subscriber fees.").

[25] This result would obtain even if rates switched over to market-based rates, especially if the Commission adopts GSN's proposal to allow cable operators to limit any one type of leased access programmer to no more than 50 percent of their designated channels. See GSN Comments at 11-13.

Many comments also used flawed surveys and inflated the number of existing programming services likely to be displaced by leased access in order to exaggerate lost subscriber revenue. TCI, in its survey, stated that "based on the companies that are currently requesting to lease channels . . it is likely that most of the leased channels will be home shopping channels or channels that show . . . infomercials."[26] The survey then went on to state that as many as nine channels would be dropped to make room for such services, and specifically listed such channels as fX, CNBC, VH-1, ESPN2 and Court TV.[27] Similarly, Continental Cablevision, in its survey, stated that "[u]nlike the channels which are selected by your cable company based on expected popularity, [leased access] channels are programmed at the sole discretion of the person buying the time. Typically, this programming focuses on various topics such as infomercials, home shopping, and ethnically oriented programs."[28] This survey then stated that the Commission's proposed rules "may cause existing channels . . . to be eliminated from your cable service. This includes networks such as Comedy Central, The Family Channel, Lifetime, the TV Food Network, BET, Headline News, and the Preview Guide Channel."[29]

Essentially, these surveys asked, "We're going to replace a large number of high quality channels with unattractive programming. How do you feel about that?"

---

[26] TCI Comments, Attachment G at 5.

[27] Id.

[28] Continental Comments, Attachment 2 at 8.

[29] Id.

Unsurprisingly, both surveys showed that large numbers of subscribers did not like leased access at all. These surveys have been designed to exaggerate the reaction of subscribers to leased access by presenting an inaccurate picture of the types of programmers likely to use leased access under a cost/market rate regime. Moreover, many cable operators have asserted that they would, most likely, drop the newest channels with the lowest subscriber appeal.[30] These assertions are directly at odds with the scenario presented to subscribers by the surveys which largely referred to channels such as Lifetime, Headline News, VH-1, BET, CNBC (formerly FNN) and The Family Channel, all of which are popular channels and more than ten years old.

Furthermore, these surveys, and cable operator arguments in general, exaggerated the number of channels that are likely to be displaced. Taking a system with a capacity of 60 channels as an example, the cable operator would exclude must-carry channels, but would not exclude retransmission consent.[31] Assuming only a few channels would be excluded because most local broadcasters will opt for retransmission consent, the 15 percent set aside would probably result in a requirement of nine channels.[32] This does not mean, however, that the cable operator must remove existing programming on all nine

[30] See Continental Comments at 20-21; Cox Comments at 14; TCI Comments at 6; Time Warner Comments at 34-35; see also Comments of Cable Programming Coalition of A&E Television Networks et al. 38 (filed May 16, 1996) ("A&E Comments"); Outdoor Life Network Comments at 27-28.

[31] See FNPRM at ¶¶ 54-56.

[32] GSN also assumes that the operator rounds up when calculating the set aside.

channels. Some channels may be dark, requiring no displacement, and up to a third may be filled with qualified minority and educational programming.[33] Because cable operators have been extremely successful at programming diverse and educational programming, the system could -- and as a practical matter certainly will -- easily fill those three channels with its own selection of affiliated or unaffiliated educational or minority owned programming.[34] This leaves six channels. If the Commission accepts GSN's proposal to limit the number of channels held by any one type of leased access programming to 50 percent of available capacity, this leaves only three channels for direct sales programming. Most system operators currently carry one if not two or more direct sales channels which could be designated as leased access channels.[35] Thus, at worst, and on the largest cable systems, cable operators would be faced with one or two additional direct sales channels.[36] The other three could be taken up by high quality advertising supported programming, not-for-profit programming and premium programming services. Regardless of program category, GSN

---

[33] Communications Act, § 612(i)(1), 47 U.S.C. § 532(i)(1).

[34] Such programming frequently carried by cable operators includes BET, The History Channel and The Learning Channel. The Pennsylvania Cable Network, which opposes the Commission's proposed rules, see Comments of Pennsylvania Cable Network (filed May 14, 1996), would also qualify for this set aside.

[35] Similarly, most cable operators also carry advertiser supported program networks that sublet large blocks of time to infomercial producers. Cable operators who wish to minimize leased access capacity dedicated to infomercials could cover these sublet hours with other material, including that of leased access programmers.

[36] In fact, the two dominant home shopping channels, QVC and Home Shopping Network account for more than 90 percent of the home shopping business and are controlled by cable operators (Comcast/TCI and TCI, respectively). Therefore, an additional one or two direct sales channels would significantly contribute to competition within this segment of cable programming, consistent with the diversity goals of leased access.

expects some of the incumbent channel designees may opt for leased access in order to retain carriage. Thus, less than half of the nominal leased access channels set aside would actually result in channel displacement even if no dark channels were available. More importantly, the composition by program category would not change significantly.

Of course, the above analysis assumes a large cable system with a nominal set aside of nine channels. Cable systems with less than 55 channels subject to the 10 percent set aside (most cable systems), would be forced to increase direct sales programming only modestly should they choose to designate channels already carrying direct sales programming. Overall, even if only one dark channel is available and no incumbent channel designee opts for leased access, the typical cable system is unlikely to displace more than one or two channels.

In summary, comments overstated lost revenue as a result of subscriber flight in two ways. First, the quality of leased access programming under the proposed regime is likely to be much better than has been represented to the Commission and subscribers. By offering either special interest or broadly appealing programming that is high quality and, above all, independent, leased access programmers may attract new subscribers to cable systems. Second, displacement of existing services, even if all channels are used, is likely to be far less dramatic than has been represented to the Commission and subscribers. Accordingly, there is no reasonable basis to suggest that there will be lost subscribers, and thus that lost subscriber revenue should be included in opportunity cost calculations.

III. LEASED ACCESS IS A RIGHT AND SHOULD BE REGULATED AS SUCH

Congress required cable operators to designate channel capacity for leased access use and granted unaffiliated programmers the right to use this capacity on request.[37] Most of the comments opposing changes to the leased access rules, however, portray leased access as a privilege cable operators cannot possibly grant: increased use of leased access will seriously impair existing programming arrangements;[38] increased use of leased access will bump "legitimate" cable programming off systems;[39] or leased access is inherently less interesting to subscribers than programming chosen by cable operators.[40] These arguments all seem to proceed from the assumption that leased access is little more than a handout to low quality programmers. Leased access is not a handout -- it is a serious attempt to allow diverse sources of information to reach the public over the most pervasive non-broadcast video programming medium.

---

[37] See Communications Act, § 612, 47 U.S.C. § 532.

[38] See Adelphia Comments at 21-22; Continental Comments at 29-31; SCBA Comments at 24-25; Viacom Comments at 6-7.

[39] See CTO Comments at 10; NCTA Comments at 26-27; TCI Comments at 11; Time Warner Comments at 30, 32; see also A&E Comments at 38-39; Outdoor Life Network Comments at 10.

[40] See Continental Comments at 35; CTO Comments at 9-10; Comments of Discovery Communications, Inc. 5-6 (filed May 15, 1996) ("Discovery Comments"); NCTA Comments at 14; TCI Comments at 21; Time Warner Comments at 32-33.

Hence, the Commission should reject comments opposing the Commission's proposed rules as inconsistent with the nature of leased access as a statutory right. Whatever the current use of leased access capacity may be, whatever the amount of programming available may be, whatever the competitive climate of video programming may be, programmers have the right to leased access at a reasonable rate. Of course, use of leased access must be "consistent with growth and development of cable systems"[41] and the price, terms and conditions of leased access must be "at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system."[42] However, these protections were not designed to turn the right of leased access into a privilege granted by cable operators. Congress has stated that "it is vital that the [Commission] use its authority to ensure that these channels are a *genuine outlet* for programmers."[43] At most, the competing policies underlying the leased access rules require the Commission to "promote competition and diversity of programming sources on one hand, as well as to further the growth and development of cable systems on the other."[44]

As GSN has shown in its comments and further illustrated in this reply, the Commission's proposed rules will significantly advance the ability of unaffiliated programmers to gain access to cable systems, but will not work such a drastic effect on cable

---

[41] Communications Act, § 612(a), 47 U.S.C. § 532(a).

[42] Id. § 612(c)(1), 47 U.S.C. § 532 (c)(1).

[43] S. Rep. No. 92, 102d Cong., 1st Sess. 79 (1992) (emphasis added).

[44] FNPRM at ¶ 25.

systems that their growth and development will be significantly impaired. Indeed, GSN believes there has been no persuasive showing that growth and development will be impaired at all, and that cable operators will benefit from increased use of leased access and the market-based rates that will result once demand for leased access reaches the level it should.

Accordingly, the Commission should not only implement its cost/market formula without regard to arguments that denigrate the nature of leased access, but should also reject requests for transition periods[45] or unfettered discretion regarding tier and channel placement.[46] Virtually all comments requesting a transition period have relied on the argument that increased use of leased access will disturb existing programming arrangements.[47] GSN reiterates, however, that these arrangements were entered into with full knowledge that leased access might require displacement of non-leased access programming *immediately* at the time an agreement was concluded with a programmer.[48] A transition period thus only further delays the exercise of programmer rights under leased

[45] See Adelphia Comments at 21-22; Continental Comments at 29-31; CTO Comments at 5, 22; SCBA Comments at 22-26; see also Outdoor Life Network Comments at 37-38; Viacom Comments at 9-10.

[46] See Adelphia Comments at 24-25; CTO Comments at 19-20; Discovery Comments at 15-16; NCTA Comments at 28-31; TBS Comments at 10; TCI Comments at 22-25; Viacom Comments at 11-12.

[47] See Adelphia Comments at 21-22; Continental Comments at 30; CTO Comments at 5; SCBA Comments at 24-25.

[48] See GSN Comments at 15-18.